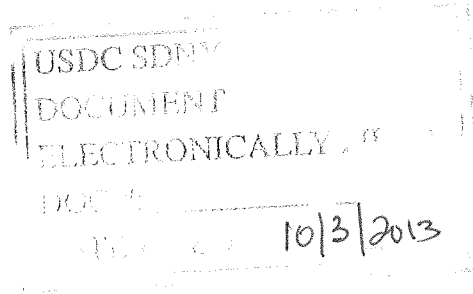


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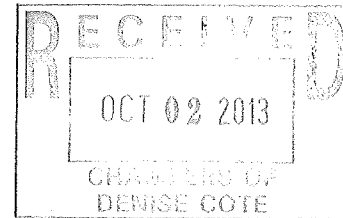
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October 2, 2013

VIA ECF

MEMO ENDORSED



The Honorable Denise L. Cote
United States District Court Southern District of New York
500 Pearl St., Room 1610
New York, NY 10007

Re: In re: Electronic Books Antitrust Litig., No. 11-md-02293 (DLC); The State of Texas v. Penguin Group (USA), Inc., No. 12-cv-3394 (DLC)

Dear Judge Cote:

We write in response to Class Plaintiffs' September 30, 2013 letter concerning whether the Class and States are permitted to submit a class certification and damages expert rebuttal report. Plaintiffs' proposed submission of a rebuttal expert report on December 13, 2013—the day that marks the end of expert discovery—is in conflict with this Court's Scheduling Order and with Plaintiffs' prior representations, and would unfairly deprive Apple of the opportunity to conduct discovery of, or respond to, the rebuttal report opinions.

The current schedule does not, as the Class Plaintiffs claim, "contemplate" or allow for the submission of a rebuttal expert report by Plaintiffs. At the August 9, 2013 hearing discussing the parties' respective scheduling proposals, Class Plaintiffs agreed with the Court "that both fact and expert discovery, in essence, would be over in 2013," because "plaintiffs' expert reports would be served on October 11" and "the defendant's expert reports under the plaintiffs' proposal would be served on November 15[.]" Aug. 9, 2013 Hearing Tr. 43:10-18. Class Plaintiffs made no mention of a need for a rebuttal expert report during that hearing. *See id.* These were the two deadlines adopted by the Court for the disclosure of all expert testimony. *See* Scheduling Order, Aug. 13, 2013, ECF No. 380 ¶ 2. The Scheduling Order further provides that "[e]xpert discovery shall conclude by December 13, 2013" (*id.* ¶ 3), thus allowing each party to depose the opposing party's experts after submission of the October and November expert reports, respectively.

Plaintiffs now seek to submit a rebuttal expert report on the very day expert discovery closes. Apple's opposition to this request is not a "tactical gambit," nor does Apple "not [] want to be informed of Plaintiffs' expert's rebuttal to Apple's expert report on damages." Berman letter, ECF No. 412 at 2. Apple is entitled to seek discovery from and depose Plaintiffs' expert regarding opinions contained in any rebuttal report. *See* Fed. R. Civ. P.

relevant report ~~includes~~ ^{includes} new opinions that ~~was~~ could not have been anticipated by Apple's expert(s), Apple may file a summary report by the close of expert discovery.

Quinn Lott 10/3/13

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October 2, 2013
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Sincerely,

Dan Swanson by CTH

Daniel G. Swanson

DGS/lr